1926

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 166.

BROWNE, MANZANARES & COMPANY, PLAINTIFFS IN ERROR,

vs.

FRANCISCO CHAVES, SECOND.

FILED DECEMBER 11, 1899.

No. 247.

BROWNE & MANZANARES COMPANY, APPELLANTS,

vs.

FRANCISCO CHAVES, SECOND.

FILED APRIL 19, 1900.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

(17,585 & 17,711.)

(17,583 & 17,711.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 165.

BROWNE, MANZANARES & COMPANY, PLAINTIFFS IN ERROR,

vs.

FRANCISCO CHAVES, SECOND.

FILED DECEMBER 11, 1899.

No. 247.

BROWNE & MANZANARES COMPANY, APPELLANTS,

vs.

FRANCISCO CHAVES, SECOND.

FILED APRIL 10, 1900.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Caption	3	2
Transcript from district court	4	2
Writ of error	4	2
Clerk's certificate and return	5	2

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1900.

	Original.	Print
Præcipe for *scire facias*	6	3
Writ of *scire facias*	6	3
Sheriff's return	8	4
Appearance for defendant	8	5
Pleas	9	5
Demurrer to pleas	10	6
Order overruling demurrer	12	7
Motion to set aside order on demurrer, &c	12	7
Order setting demurrer for re-argument	13	8
Order overruling demurrer	14	8
Judgment	15	9
Clerk's certificate	15	9
Assignment of errors	16	9
Order taking cause under advisement	17	10
Order of continuance	17	10
Hearing and submission	18	10
Judgment	19	11
Opinion	19	11
Clerk's certificate	28½	18
Waiver of citation	29	18
Order allowing appeal	30	18
Clerk's certificate	30	19
Citation and service	32	19

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court, before you, wherein Browne, Manzanares & Co. were plaintiffs in error and Francisco Chavez, 2nd, was defendant in error, a manifest error hath happened, to the great damage of said Brown, Manzanares & Co., as by their complaint appears, we, being willing that error, if any hath been, should *ne* duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Supreme Court, Territory of New Mexico.

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

2 TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

Supreme Court.

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States a true copy of the record and proceedings in this cause therein mentioned under my hand and the seal of the supreme court of the Territory of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

Be it remembered that heretofore, on, to wit, the 16th day of May, A. D. 1897, there was filed in the office of the clerk of the supreme court a transcript of record; which said transcript of record is in words and figures as follows, to wit:

3 In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1897.

BROWNE, MANZANARES & CO., Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2D, Defendant in Error. } No. 718.

Transcript of Record.

Childers & Dobson, attorneys for plaintiffs in error.
B. S. Rodey, attorney for defendant in error.

4 The Territory of New Mexico to the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of the judgment in a certain cause lately pending before you, wherein L. P. Browne and F. A. Manzanares, partners under the firm name and style of Brown and Manzanares were plaintiffs and Francisco Chavez, 2nd, was defendant, error has intervened, as it is said, to the damage of the said plaintiffs, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the last Monday of July, A. D. 1897, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable Thomas Smith, chief
[COURT SEAL.] justice of the supreme court of the Territory of New Mexico, and the seal of said court, this 6th day of April, A. D. 1897.

GEO. L. WYLLYS, *Clerk.*

5 I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the foregoing writ of error from the supreme court of the Territory of New Mexico to the said district court of the second judicial district of said Territory, sitting within and for the county of Bernalillo, in the case wherein L. P. Browne and F. A. Manzanares, partners under the firm name and style of Browne & Manzanares, are plaintiffs in error and Francisco Chavez, 2nd, is defendant in error, was caused to be lodged in my office by the said plaintiffs in error, on the 14th day of May, A. D. 1897; and I further certify that in accordance with the command of said writ, I herewith send a copy of the record, judgment and other proceedings had in said cause in the said district court, as the same appear of record in my office, to the supreme court of the Territory of New Mexico, together with this writ.

[COURT SEAL.] Witness, my hand and the seal of said district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, on this the 14th day of May, A. D. 1897.

O. N. MARRON, *Clerk.*

Be it remembered, that heretofore, to wit, on the 30th day of September, A. D. 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a præcipe for
6 *scire facias*, which said præcipe is in the words and figures following, to wit:

In the District Court, Second Judicial District, Territory of New Mexico, for the County of Bernalillo.

L. P. BROWNE and F. A. MANZANARES, Partners under the Firm Name and Style of Browne & Manzanares,
vs.
FRANCISCO CHAVEZ, SECOND.

The clerk of said court will issue *scire facias* against the said Francisco Chavez, Second, to revive the judgment rendered in this behalf against him in the said court in the October term, 1885, and returnable to the next October term of the said court.

September 30th, 1895.

E. W. DOBSON,
Attorney for Plaintiffs.

To O. N. Marron, clerk of the district court, second judicial district, Territory of New Mexico, county of Bernalillo.

And thereafter, and on the 30th day of September, A. D. 1895, there was issued out of the office of the said clerk in said cause a writ of *scire facias*, which said writ is in the words and figures following, that is to say:

The Territory of New Mexico to the sheriff of the county of Bernalillo, Greeting:

Whereas L. P. Browne and F. A. Manzanares, heretofore, in our district court of the second judicial district of the Territory of New Mexico, for the county of Bernalillo, in the October term thereof in the year 1885, to wit, on the 7th day of October, A. D. 1885,
7 by the consideration and judgment of the same court, recovered against Francisco Chavez, Second, in a certain action of assumpsit, the sum of four thousand one hundred seventy dollars damages, and also the costs of said L. P. Browne and F. A. Manzanares in that behalf taxed at the sum of eight and $\frac{20}{100}$ dollars, whereof the said Francisco Chavez, Second, was convicted, as appears to us of record; and now on behalf of the said plaintiffs, Browne and Manzanares, we have been informed that although judgment be given as aforesaid, yet execution of the damages and costs aforesaid

still remains to be made to him; wherefore the said Browne & Manzanares, as aforesaid, have besought us to provide them a proper remedy in this behalf. We do therefore command you that you make known to said Francisco Chavez, Second, that he be before our said district court at the court-house in Albuquerque in the county aforesaid on the first Monday of October next, to show cause if any he have why said Browne & Manzanares ought not to have execution against him, the said Francisco Chavez, Second, of the damages and costs aforesaid, according to the form and effect of said recovery, and have you there then this writ.

Witness the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and [COURT SEAL.] judge of the said district court, and the seal thereof, at Albuquerque, aforesaid, this the 30th day of September, A. D. 1895.

O. N. MARRON, *Clerk.*

8 And thereafter and on, to wit, the 5th day of October, 1895, there was returned into the office of the said clerk, in said cause, the original writ of *scire facias*, with the sheriff's return attached, which said return is in the words and figures following, to wit:

I, sheriff of Bernalillo county, New Mexico, certify that I have served this summons on the within-named Francisco Chavez, 2nd, on the 30th day of September, 1895, at said county, by then and there delivering a copy of the same to Mrs. Francisco Chavez, 2nd, a free person residing at the usual place of abode of said Francisco Chavez, 2nd, over fifteen years of age, the said Francisco Chavez, 2nd, being then absent.

T. S. HUBBELL,
Sheriff of Bernalillo County.
By ——,
Deputy Sheriff.

Fees.

Service	$1.00
Mileage, 20 miles	2.50
Return	.50
	$4.00

And thereafter and on, to wit, the 7th day of October, A. D. 1895, there was filed in the office of the said clerk, in said cause, an appearance, which said appearance is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

L. A. BROWNE ET AL. }
vs. } No. 4349. Appearance.
FCO. CHAVEZ, 2ND. }

9 Comes now the above-named defendant by his attorney, B. S. Rodey, and enters appearance herein, and calls upon the plaintiffs for a copy of the declaration, etc.

B. S. RODEY,
Attorney for D'f't.

And thereafter, on, to wit, the 17th day of October, A. D. 1895, there was filed in the office of the clerk of the said court in said cause defendant's pleas, which said pleas are in the words and figures following—that is to say:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

BROWNE & MANZANARES }
vs. } Writ of *Scire Facias.* Defendant's Pleas.
FRANCISCO CHAVEZ, 2ND. }

Comes now the above-named defendant by his attorney, B. S. Rodey, and defends the wrong and injury, when, etc., and says that the said writ ought not to issue in the premises, because, he says, and here suggests to the court, that since the rendition of the said alleged judgment in said citation mentioned the said L. P. Browne departed this life on, to wit, the — day of ——, A. D. 189–, and this the defendant is ready to verify.

Wherefore he prays judgment if the said writ ought to issue or the said cause be revived.

BERNARD S. RODEY,
Att'y for Defendant.

And for a further plea in this behalf, the said defendant by his said attorney says that the said writ ought not to issue or the said action be revived, because he says that the said alleged judgment in the said petition and citation mentioned was not obtained or
10 rendered in said court and did not accrue to said plaintiffs within seven years next before the issuing of the said citation, but on the contrary the said judgment was as appears by the face of said citation obtained in this court on the 7th day of October, A. D. 1895, or nearly ten years before the issuing of said citation, and therefore under the provisions of No. 2 of chapter LIII of the Session Laws of New Mexico of the year 1891 the said judgment was without force on the 30th day of September, A. D. 1895, when the citation herein was issued out of this court; and this the defendant is

ready to verify; wherefore the said defendant prays judgment that the said citation be quashed, and the said cause be not revived.

BERNARD S. RODEY,
Attorney for Defendant.

Received a true copy of above pleas this Oct. 10, '95.

CHILDERS & DOBSON,
By WILMOT BOOTH.

And thereafter, on, to wit, the 1st day of November, A. D. 1895, there was filed in the office of the said clerk, in said cause, a demurrer to the 1st and 2nd pleas of defendant, which said demurrer is in the words and figures following, to wit:

In the District Court, Territory of New Mexico, County of Bernalillo.

BROWNE & MANZANARES
vs.
FRANCISCO CHAVEZ, SECOND. } *Scire Facias* to Revive Judgement.

Now comes Francisco A. Manzanares, surviving partner of the partnership under the name and style of Browne & Manzanares, composed of said Francisco A. Manzanares and Lawrence P. Browne, deceased, and says: That he ought not to be barred from
11 having and maintaining his aforesaid proceeding to revive said judgment rendered in the lifetime of said Lawrence P. Browne, in favor of said firm of Browne & Manzanares, composed as aforesaid of said Lawrence P. Browne, now deceased, and said Francisco A. Manzanares, by reason of anything alleged by the said defendant Francisco Chavez, Second, in his first and second pleas filed to said writ, and that he, the said plaintiff, ought not to be compelled in law to answer said pleas, but demurs to same, and for cause of demurrer, alleges the following, to wit:

1st. The said judgment which is sought to be revived was rendered in the lifetime of the said Lawrence P. Browne in favor of the firm of Browne & Manzanares, composed as aforesaid, and he, the said Francisco A. Manzanares, as surviving partner has a right to maintain said proceeding, and to have the said judgment revived.

2nd. Because the said judgment was rendered in favor of the firm of Browne & Manzanares and not in favor of said Lawrence P. Browne individually.

3rd. The said plea filed by said defendant is not good in law because said judgment is not barred within seven years from the date of the rendition thereof.

4th. Because this proceeding is not an original suit, but is part of the original suit which was brought, and in which said judgment was rendered.

Wherefore plaintiff prays judgment of the court, whether he should be required to answer said pleas.

E. W. DOBSON,
Attorney for Plaintiff.

12 And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house in said county, at the October, 1895, term and on the thirty-third day of said term, the same being the 27th day of November, 1895, there was entered of record, among other proceedings, the following, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district thereof.

L. P. BROWNE ET AL.
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

This cause having been heretofore heard by the court upon the plaintiffs' demurrer to the defendant's plea herein and taken under advisement by the court, the court being now sufficiently advised—

It is ordered and adjudged that the said demurrer be and the same is hereby overruled.

And there-, on to wit, the 5th day of December, A. D. 1895, there was filed in the office of the said clerk in said cause, a motion to set aside order overruling demurrer and for a rehearing, which said motion is in the words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

BROWNE & MANZANARES
vs.
FRANCISCO CHAVEZ, SECOND.

Now comes Francisco A. Manzanares, surviving partner of the firm of Browne & Manzanares and prays the court to set aside
13 the order heretofore overruling the demurrer of the said plaintiffs to the pleas filed by said defendant to the writ of *scire facias* issued in this cause, for the purpose of permitting the plaintiff to re-argue said demurrer. The questions arising upon said demurrer were not fully argued, before the court, and said plaintiff desires to submit additional authorities upon the proposition.

E. W. DOBSON,
Plaintiff's Attorney.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of said county at the October, A. D. 1895, term and on the thirty-ninth day of said term, the same being the 5th day of December, 1895, there was made and entered of record, among other proceedings, the following, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the district court of the second judicial district thereof.

BROWNE & MANZANARES
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

Upon hearing the motion of the plaintiff in this cause to set aside the order sustaining defendant's demurrer—

It is ordered by the court that said motion be sustained and that the said demurrer be set down for re-argument on the 10th day of January, A. D. 1895.

14 And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of said county at the October, 1896, term, and on the twenty-first day of said term, the same being the 28th day of October, 1896, there was had and entered of record, among other proceedings, the following, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the district court of the second judicial district court thereof.

L. P. BROWNE ET AL.
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

This cause having been set down for argument by the court upon the demurrer of the said plaintiffs to the second plea of the said defendant, comes now the said defendant by his attorney, B. S. Rodey, Esq., and the said plaintiffs come not, the court being fully advised.

It is considered and adjudged by the court that the said demurrer be and it is hereby overruled.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of said county at the March, 1897, term, and on the thirtieth day of said term, the same being the 5th day of April, A. D. 1897, the following proceedings, among others, were had and entered of record, to wit:

Present: The Honorable Needham C. Collier, associate jus-
15 tice of the supreme court of the Territory of New Mexico and judge of the district court of the second judicial district thereof.

BROWNE & MANZANARES CO.
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

The demurrer of the said plaintiffs to the second plea of the said defendant having been overruled by the court, come now the said plaintiffs by their attorneys and refuse to plead further, but stand on the said demurrer.

It is therefore considered and adjudged by the court that the said writ be, and it is hereby, dismissed, and that the defendant go hence without day and that the plaintiffs pay the costs herein to be taxed and that execution issue therefor.

TERRITORY OF NEW MEXICO, } ss:
Second Judicial District Court, County of Bernalillo, }

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy of the record and proceedings had in said cause relative to the writ of *scire facias* issued out of said cause by the appellant, including said writ and all subsequent proceedings therein.

[COURT SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of the said court, this 12th day of July, A. D. 1897.

O. N. MARRON, *Clerk.*

16 And afterwards, to wit, on the 26th day of May, A. D. 1897, there was filed in the office of the clerk of the supreme court an assignment of errors; which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1897.

BROWNE, MANZANARES & CO., Plaintiffs in Error, }
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error. }

Assignment of Errors.

Now comes the plaintiff in error and assigns as error, committed by the court in the trial of said cause by the court below, the following, to wit:

First. The court committed error in overruling plaintiffs in error's demurrer to the two pleas filed by defendant in error to the writ of *scire facias* sued out in said cause.

CHILDERS & DOBSON,
Attorneys for Plaintiffs in Error.

Which said assignment was endorsed on the back thereof as follows, to wit:

No. 718. Supreme court, July term, 1897. Browne, Manzanares & Co. *vs.* Francisco Chavez, 2nd. Assignment of errors by plaintiffs in error. Filed in my office this 26th day of May, A. D. 1897. Geo. L. Wyllys, clerk. Childers & Dobson, attorneys.

17 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé on the last Monday of July, A. D. 1897, the same being

July 26th, 1899, on the thirteenth day thereof, the same being the 9th day of August, A. *A.* 1897, the following, among other, proceedings were had as follows, to wit:

L. P. BROWNE and F. A. MANZANARES, Partners under the Firm Name and Style of Browne and Manzanares, Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

This cause coming on to be heard upon the transcript of record, assignment of errors, and brief of counsel, and after hearing argument by counsel for the repective parties, *and* the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the thirty-sixth day of said regular term, the same being the 11th day of January, A. D. 1898, the following, among other, proceedings were had as follows, t*i* wit:

L. P. BROWNE and F. A. MANZANARES, Partners under the Firm Name and Style of Browne & Manzanares, Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

It is ordered by the court that this cause be, and the same is hereby, continued until the next regular term of this court.

18 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé on the last Monday of July, the same being the 25th day of July, A. D. 1898, on the fifth day thereof, the following, among other, proceedings were had, as follows, to wit:

BROWNE, MANZANARES & Co., Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

This cause having come — to be heard upon transcript of record, assignment of errors, and briefs of counsel on file, the same was argued by B. S. Rodey for the defendant in error.

And afterwards, to wit, on the sixth day of said regular*d* term, the same being the 1st day of August, A. D. 1898, the following, among other, proceedings were had, as follows, to wit:

BROWNE, MANZANARES & CO., Plaintiffs in Error, *vs.* FRANCISCO CHAVEZ, 2ND, Defendant in Error.	No. 718. Error to District Court of Bernalillo County.

This cause, again coming on to be heard upon transcript of record, assignment of error, and briefs of counsel, was argued by William B. Childers for plaintiffs in error and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the seventeenth day of said regular term, the same being the 16th day of August, A. D. 1898, the following, among other, proceedings were had, as follows, to wit:

19

BROWNE, MANZANARES & Co., Plaintiffs in Error, *vs.* FRANCISCO CHAVES, 2ND, Defendant in Error.	No. 718. Error to District Court of Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice John R. McFie, Chief Justice William J. Mills and Associate Justices Frank W. Parker, J. W. Crumpacker, and Charles A. Leland concur-ing, affirming the judgment of the court below for reasons states in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Bernalillo, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith it is considered and adjudged by the court that the said writ be, and it is hereby, dismissed, and that the defendant in error go hence without day, and that the plaintiff pay the costs herein, to be taxed, and the costs in this court and those in the court below, for which let execution issue.

And afterwards, to wit, on the 16th day of August, A. D. 1898, there was filed in the office of the clerk of the supreme court the opinion of the court; which said opinion is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1898.

BROWNE & MANZANARES CO., Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

20

Syllabus.

A judgment barred by the statute of limitations of seven years, sec. 1861, Comp. Laws 1897, cannot be revived by *scire facias*.

Scire facias to revive a judgment is an action within the meaning of sec. 1861, Comp. Laws of 1897.

The bar of the statute of limitation may be preaded against an action of *scire facias* to revive a judgment unrevived and more than seven years old, and the overruling of a demurrer to such plea is not error.

Statement.

On the 7th day of October, 1885, the firm of Browne and Manzanares Co. recovered a judgment against Francisco Chaves, Jr., for the sum of $4,170.00 and costs in the district court of Bernalillo county.

On the 30th day of September, 1895, and nearly ten years after said judgment was rendered, a precipe was filed with the district clerk for a writ of *scire facias* to revive the judgment and for execution. The writ was issued and served by the sheriff on September 30th, and was returnable October 5th.

On October 5th the defendant filed written appearance, and on October 5th filed two pleas, the first suggesting the death of Browne, one member of the firm, since the rendition of the judgment, and the second, a plea of the statute of limitations of seven years, in bar of the action.

The plaintiffs below demurred to the pleas, but the demurrer was overruled.

Afterwards a motion was filed by plaintiffs below to reopen the case for re-argument of the demurrer; which motion was sustained by the court, and the cause was set down for re-argument January 10th as to the second plea only. The first plea appears to have been abandoned, as also the demurrer thereto.

21 The court again overruled the demurrer to second plea, and, the plaintiffs declining to plead further, the writ of *scire facias* was dismissed.

Opinion of the Court.

McFIE, *J.*:

From the above statement of facts, it is apparent that the sole question for this court to determine is whether or not the court below erred in overruling the demurrer to the defendant's plea of the statute of limitations.

If the statute of limitations of the Territory runs against a proceeding by *scire facias* to revive a judgment, the demurrer to such plea was properly overruled and there was no error.

If the statute does not run against such action, the plea, of course, was an improper one, and it was error to overrule the demurrer thereto.

In determining this matter it is important to observe the difference between a dormant and a barred judgment.

A dormant judgment is one that has become inoperative as to its execution, but a barred judgment is one that is dead and cannot be enforced or revived over the objection of the judgment debtor.

At common law the life of a judment was twenty years, but if an execution was not issued thereon within a year and a day, the judgment became dormant and an alias execution could not issue thereon unless revived by *scire facias*.

The judgment, therefor-, although it had become dormant, was not dead, as its life was twenty years. If the first execution was issued within a year and a day, it did not then become dormant; on the contrary, executions might issue for its enforcement during its life of twenty years, unless it became dormant for some other reason—such, for instance, as death of the parties to it, or assignment, &c., when it might issue for its enforcement, notwithstanding its changed condition.

Freemen on Executions, sec. 31, says:

22 "Before any judgment is either satisfied or barred by lapse of time it may become temporarily inoperative, so far as the right to issue execution is concerned, and so continue until something is done by which such is revived. In this condition it is usually called a dormant judgment."

The writ of *scire facias* was adopted at common law as the proper means of restoring vitality to a dormant judgment before it was satisfied or barred by limitation.

Bingham on Judgments and Executions, 123 and 124, thus defines the writ of *scire facias*: "It is a writ issued out of a court wherein judgment has been entered or to which a record has been removed, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, which such execution should not issue.

It is clear that at common law the proceeding by *scire facias* was not a new or distinct action, but simply a writ or process in the original suit for the sole purpose of securing the right to issue execution upon a dormant judgment prior to the expiration of its legal life, and it was not intended nor used for the purpose of reviving a judgment whose life had expired and became barred by a statute of limitation.

In the early case of Roos *vs.* Duval *et al.*, 13th Peters, p. 45, the court was considering a case from Virginia. In that State the law provided that a judgment might be revived upon a motion in the nature of *scire facias*. The statute of limitation as to judgments was ten years. Duval *et al.* had recovered a judgment against Roos, and

when the judgment was about 15 years old a motion was made for an execution to issue, and the motion being sustained, on appeal it was urged that the execution was illegally issued, because the statute of limitation of ten years had barred the judgment and all process upon it.

In construing that statute and its effect in that case the court said: "It is enough to know that the act of 1792 (Virginia) imposes a limitation to actions and executions on judgments by which, like all other limitation laws of the States, a judgment becomes in-
23 operative. An action of debt will not lie upon it, nor can it be revived by *scire facias*, much less can an execution be issued upon it. Its vitality is gone beyond the reach of legal renovation."

This case did not arise under the common law, it is true, but under a statute. We refer to it, however, as showing the construction of a statute of limitation, and that its effect is to destroy the vitality of such judgment beyond the power of revival by *scire facias* or any other process.

Many other cases might be cited to the same effect, but it is unnecessary.

The distinction between a dormant and a barred judgment is very clear, and with this in mind it is not difficult to understand the apparent conflict of authority found in the briefs of the respective counsel in this case.

The case of Smith *vs.* Stevens, N. E. Rep., 594, is cited by plaintiffs in error to sustain their contention, wherein the court held that "although the statute of Illinois provided that the lien of a judgment should continue for only seven years, and that the judgment at that time should become *functus officio* so as to affect the lands therein described, that nevertheless it might be revived by *scire facias*," &c.

In that case the Illinois statute provided that the life of a judgment should be twenty years, but that it ceased to be a lien on real estate in seven years. In other words, it became dormant as to the lien on real estate in seven years, but could be revived by *scire facias* as to the lien during the remaining thirteen years of its life. It was a dormant, not a barred, judgment.

The case of Murch *vs.* Moore, 2nd Oregon, 189, is not in point, because the court holds in that case that a judgment is never barred under the laws of Oregon and may be executed until payment.

The common law, however, has been modified or set aside by statutory enactment in almost all the States and Territories in regard to judgments and the limitation of action thereon.
24 While the right of action in debt and *scire facias* on judgments remain, other provisions are charged, and the authorities cited are not necessarily in conflict when the statutes upon which the decisions were rendered and the circumstances of each case are examined.

The proceeding to revive a dormant judgment in many of the States is by simple motion in the original cause, and execution is awarded by an order in the original case.

In such cases it is usually held that the order to revive does not

more than reinvest the plaintiff with the right to have execution on his original judgment.

Marx *vs.* Sanders, 11 So. Rep., 764.

In that case the action of debt was held barred by the six years' statute of limitation, although the judgment had been once revived within its life

In other State- statutes provide or are construed to mean the *scire facias* is an "action" within the meaning of the statute.

In Greenway *vs.* Dare, 6 N. J. Law, 306—

It was contended by counsel that the proceeding by *scire facias* was not an action or new proceeding, but a continuance of the original suit; but the court held that "every *scire facias* is a new and independent action, referring to the former proceedings, but wholly distinct from them."

In Howard *vs.* Randall, 5th Atlantic Rep., 403—

The court says: "Whatever, strictly speaking, may be the nature of *scire facias* on a judgment at common law, under our statute it is an action or suit within section 2130, R. L."

The plaintiff in error contends that a *scire facias* proceeding is not an action within the meaning of the laws of New Mexico, sec. 1861, Comp. Laws 1897; sec. 2, chap. 53, Laws of 1891, and therefore is not barred by that section, while defendant in error insists that it is an action within the meaning of that section.

Section 1860, C. L. 1884, is as follows: "The following suits or actions, may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

Sec. 1861 prior to amendment by laws of 1891 was as follows: "Actions upon a judgment of any court of record of any State or Territory of the United States, or Federal courts of the United States, within fifteen years."

By these sections *of* limitation of fifteen years attached to foreign judgments, and, if that section did not also include local judgments, common law of limitation of twenty years applied to them until section 1861 was amended by sec. 2, chap. 53, Laws of 1891, to read as follows:

SEC. 2 (1891). "Actions founded upon a judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterwards, and actions founded upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal courts may be brought within seven years from and after the rendition of such judgment, and not afterwards; provided, that *ca*tions may be brought upon any existing judgments which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterwards; and all actions upon such judgments not commenced within the time limited by this act, shall be forever barred."

This section, as amended, applies to local judgments as well as foreign and Federal, and fixes a positive limitation of right of action

thereon at seven years, and specifically says "and not afterwards." It is not denied that this limitation would bar an action of debt on a judgment, but it is insisted that the words "actions founded on any judgment" *is* used in a limited sense, and do not include proceedings by *scire facias* to revive a judgment.

We cannot so construe this language, as it was evidently used in its comprehensive sense and was intended to apply to all suits or actions which could properly be brought on a judgment. "Actions founded upon any judgment" are very comprehensive words,
26 the word actions being in the plural, and the language is equivalent to saying all actions the basis of which is a judgment.

To construe this language as plaintiff in error contends would be to hold that an action of debt on a judgment could not be brought because it was barred by the statute in seven years, nor could any other suit be brought, but by *scire facias* the barred judgment may be revived and an execution issued upon it.

Such a construction is absurd and could not have been the intention of the legislature enacting the amendment.

The words "shall be forever barred," in the last line of the section, referring to stale judgments, emphasize the view that this section was intended to bar forever and render invalid all judgments more than seven years old unless the proper steps had been taken to revive them.

This section was carefully drawn, as is shown by the proviso giving one year's time in which to revive stale judgments, referred to in the proviso.

In 1887 the legislature enlarged the time for issuing execution on judgments to five years. Sec. 2, chap. 61, Laws of 1887, reads as follows:

"SEC. 2. An execution may issue at any time on behalf of any one interested in such judgment, referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing any action to revive the same."

It will be observed that the word "action" in that section is used in a liberal sense and refers directly to the proceedings to revive judgments.

The proceedings in this case show all the characteristics of an action at law. The record shows that a precipe was issued for the writ, and the writ of *scire facias* was issued, which is declared to be the equivalent of a declaration. The writ was returnable, as other writs are: the defendant was ordered to show cause; pleas and demurrer
27 were filed, as in other cases; a judgment overruling the demurrer and dismissing the cause was entered, and plaintiffs in error have the *scire facias* proceedings, not the original action, in this court seeking a review and reversal, and we see no reason why such proceedings should not be considered an action within the meaning of our statute.

The legislature- of our States having set aside the common-law rule and made *scire facias* a new and independent action, and we are

of opinion that the legislature of this Territory accomplished the same purpose when the law of 1891 was enacted.

When the legislature declared that "Actions founded upon any judgment, unless brought within seven years, would be forever barred," it evidently intended that seven years was a reasonable time in which to revive them, and that after such time they should be beyond the power of legal renovation by any proceeding whatever, and this we hold to be the meaning and intent of section 1861 of the Comp. Laws of 1897.

"Statutes of limitation are now almost universally regarded favorable as statutes of repose, and liberally construed, and the older decisions to the contrary are disapproved."

Am. and Eng. Ency. Law, vol. 13, p. 692.

"Where the law furnishes to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, we think such debtor can appeal to the statute of limitation as a protection."

Glenn *vs.* Dorsheimer, 23 Fed. Rep., 695.

"An- he cannot prevent the statute of limitations from running against him by a circuit- legal proceeding."

Glenn *vs.* Priest, ex'r, 28 Fed. Rep., 907.

Neither plaintiff nor defendant will be allowed to thwart the beneficial and healthful effect of the statute of repose by any mere strategy of legal proceeding.

Am. & Eng. Ency. Law, vol. 13, p. 691.

"It would be a mere strategy of legal proceeding to hold that a judgment could be revived by a *scire facias*, although other actions thereon were barred, and we therefore hold that section 1861,
28 Comp. Laws 1897, applies to proceedings by *scire facias* to revive judgments in this Territory.

The judgment in this case was nearly ten years old at the time this action was brought, and no execution has ever issued upon it, so far as the record shows.

The bar of the statute was properly pleaded against it, and the demurrer was properly overruled.

The overruling of the demurrer to the plea of the statute of limitation and the dismissal of the cause being the only errors assigned, the judgment of the lower court is affirmed with costs.

JOHN R. McFIE.
Associate Justice.

We concur.

WILLIAM J. MILLS, *C. J.*
J. W. CRUMPACKER, *A. J.*
FRANK W. PARKER, *A. J.*
CHARLES A. LELAND, *A. J.*

August 16th, 1898.

28½ TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Supreme Court.

I, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing twenty-eight pages *is* a full and true and perfect copy of the record and proceedings, pleadings, and opinion filed in the above-entitled cause, which is transmitted to the Supreme Court of the United States in accordance with the writ of error hereto attached.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this 25th day of September, A. D. 1899.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

29 In the Supreme Court of the United States of America, October Term, A. D. 1899.

BROWN, MANZANARES & COMPANY, Plaintiff in Error, }
vs. } Stipulation.
FRANCISCO CHAVEZ, SECOND, Defendant in Error. }

It is hereby stipulated and agreed by the attorney for the defendant in error, Francisco Chavez, Second, that the issuance and service of citation in this case shall be hereby waived, and the said defendant hereby enters his appearance to said writ of error in the Supreme Court of the United States.

Dec. 6th, 1899.

B. S. RODEY,
Att'y for Def't in Supreme Court of New Mexico.

29½ [Endorsed:] In the Supreme Court of the U. S. Browne, Manzanares Co., plaintiffs in error, *vs.* Francisco Chavez, 2nd, def. in error. Frank Springer and A. A. Jones, East Las Vegas, N. M., attorneys for plaintiff in error.

30 Be it remembered that at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being Wednesday, the 3rd day of January, A. D. 1900, on the twenty-sixth day of said term, the same being the 1st day of February, A. D. 1900, the following, among other, proceedings were had as follows, to wit:

BROWNE & MANZANARES CO., Plaintiff in Error, *vs.* FRANCISCO CHAVEZ (2ND), Defendant in Error.	No. 718.	Error to District Court, Valencia Co.

This cause coming on before the court upon the motion of the plaintiffs in error to be allowed an appeal to the Supreme Court of

the United States, and the court being sufficiently advised in the premises, allows the same. It is therefore considered and adjudged by the court that the said plaintiffs in error are hereby allowed an appeal to the United States Supreme Court in the above-entitled cause.

UNITED STATES OF AMERICA, } ss:
Territory of New Mexico, }

I, the undersigned, Jose D. Sena, clerk of the supreme court of said Territory of New Mexico, hereby certify that the foregoing is a true copy of an order of said court made and entered of record on the first day of February, A. D. 1900, in a certain cause in said court, wherein Browne & Manzanares Company was plaintiff in error and Francisco Chaves, 2nd, was defendant in error; and I do further certify that said cause is the same cause which was removed from this court into the Supreme Court of the United States by writ of error, which was sued out and bears date on the 25th day of
31 September, A. D. 1899, and that the record heretofore certified and returned by me to the Supreme Court of the United States in obedience to the command of said writ of error, together with the foregoing order, constitutes a complete record of said cause.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the Territory of New Mexico this 3rd day of March, A. D. 1900.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

32 The United States of America to Francisco Chavez, 2nd, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed in the supreme court of the Territory of New Mexico, at the January term, A. D. 1900, on the twenty-sixth day thereof, the same being the first day of February, A. D. 1900, wherein Brown & Manzanares Co. were plaintiffs in error and Francisco Chaves, 2nd, was defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as — the said appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 7th day of February, A. D. 1900.

WILLIAM. J. MILLS,
Chief Justice, etc.

I, the undersigned, attorney of record in the supreme court of the Territory of New Mexico for the appellee in the above-entitled cause,

hereby waive further service of citation in the above-entitled cause and acknowledge service thereof, provided said appeal is taken in time.

B. S. RODEY,
Attorney for Appellee in the Supreme Court of New Mexico.

Albuquerque, N. M., Feb. 19th, 1900.

Endorsed on cover: File No., 17,583. New Mexico Territory supreme court. Term No., 165. Browne, Manzanares & Company, plaintiff in error, *vs.* Francisco Chavez, 2nd. Filed December 11, 1899. And File No., 17,711. Term No., 247. Browne & Manzanares Company, appellant, *vs.* Francisco Chavez, 2nd. Filed April 10, 1900.

No. 163 and 247.

Brief of Childers & Q.

FILED
FEB 19 1901
Clerk.

SUPREME COURT

Filed Feb. 19, 1901.

UNITED STATES.

OCTOBER TERM, 1900.

No. 163

Browne, Manzanares & Company, Plaintiffs in error,
vs.
Francisco Chaves, Second, Defendant in error.

Filed December 11, 1899.

No. 247

Browne, Manzanares & Company, Appellants,
vs.
Francisco Chaves, Second, Appellee.

Filed April 20, 1900.

In error to and appeal from the Supreme Court of the Territory of New Mexico.

Brief of Plaintiffs in Error and Appellants.

WILLIAM B. CHILDERS,
Attorney for Plaintiffs in Error, and Appellants.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 165.

Browne, Manzanares & Company,
Plaintiffs in error.
vs.
Francisco Chaves, Second,
Defendant in error.
Writ of Error.

No. 247

Browne, Manzanares & Company,
Appellants.
vs.
Francisco Chaves, Second,
Appellee.
Appeal.

STATEMENT OF THE CASE.

This cause is here both by writ of error and appeal. We apprehend, however, that it is here properly only by appeal, and that as there was no trial by jury, and the issues were only questions of law de-

termined by the trial court on demurrer, that the writ of error will be dismissed and the cause held on appeal alone.

Stringfellow v. Cain, 99 U. S., 610.

The questions in the case arise on a scire facias to revive a judgment. On the 7th day of October, A. D., 1885, the firm of Browne, Manzanares & Co., composed of L. P. Browne, since deceased, and F. A. Manzanares, recovered judgment against Francisco Chavez, 2nd., in the District Court for Bernalillo County for the sum of $4,170, damages and costs. The judgment remaining unsatisfied, on the 30th day of September, 1895, a writ of scire facias was sued out, which was returned personally served on the same day. On the 7th day of October, 1895, the defendant entered his appearance to the writ, and subsequently filed two pleas. The first plea suggested the death of L. P. Browne, and prayed judgment if the said writ ought not and should not on that account issue or the said cause be revived. The second plea set up that the judgment was not in force, under the provisions of Chapter LIII of the Session Laws of New Mexico of the year 1891, when the writ was issued, because it was recovered nearly ten years before the writ was sued out. To these pleas the plaintiff in error, Francisco A Manzanares, surviving partner of the firm of Browne & Manzanares, demurred, alleging that the judgment was rendered in favor of the firm of Browne & Manzanares, composed of himself and L. P. Browne, in the lifetime of the latter, and that as surviving partner he had a

right to sue out said writ to revive said judgment; and, as to the second plea, that the statute did not bar the judgment in seven years, and that this proceeding was not the bringing of a new suit, but was a proceeding in the original suit in which the judgment was rendered. These are the questions arising on the record.

In the Supreme Court of the Territory of New Mexico the following errors were assigned

"Now comes the plaintiffs in error and assign as error, committed by the Court in the trial of said cause by the Court below, the following, to-wit:

"First. The Court committed error in overruling plaintiff in error's demurrer to the two pleas filed by defendant in error to the writ of scire facias sued out in said cause."

Appellant assigns as error in this Court, the following:

ASSIGNMENT OF ERRORS.

First. The Supreme Court of the Territory committed error in failing to reverse the action and judgment of the District Court in overruling the demurrer of the appellant to the defendant's plea to the writ, that because since the rendition of the judgment, L. P. Browne, one of the judgment plaintiffs mentioned in the writ, had died. (Record, pages 5 and 6.)

Second. Because the Supreme Court of the Territory committed error in refusing to reverse the judgment of the District Court in overruling the plaintiff's demurrer to the second plea of the defendant to the writ, that the same was barred by the statute of limitations of seven years. (Record, pages 5 and 6.)

POINTS AND AUTHORITIES.

I.

The judgment was rendered in favor of a co-partnership, and the surviving partner, as such, or in the name of the firm, can maintain any suit or other proceeding in relation thereto, and the demurrer should have been sustained to the first plea.

All actions relating to partnership affairs must be brought by the surviving partners. If pending the action a partner dies, it does not abate, but death is suggested and the suit proceeds.

17 Am. & Eng. Ency of Law, 1172-3. (First Ed.)

15 Ency of Pl. & Pr., 883.

Bischoffsheim v. Baltzer, 20 Fed. Rep., 890.

Suydam v. Ewing, 2 Blatchf., 359; 23 Fed. Cases, No. 13,655.

Parsons on Partnership, 440.

"The plaintiff in a cire facias will ordinarily be the same person who was plaintiff in the original judgment, and in such case his capacity to sue out the writ will be governed by the same rules which determine the capacity of persons to maintain other species of actions."

1 Black on Judgments, Sec. 488.

If sued out in the name of the intestate, the writ may be amended by substituting the name of the administrator.

Challenor v. Niles, 78 Ill., 78.

The judgment, as well as the writ, showed that it

Note.—In the district court two judgments were entered, the first of which (Record, p. 7) overruled the plaintiff's demurrer as a whole; but this was afterwards set aside, (Record, p. 8), and on further hearing the demurrer was overruled only so far as it applied to the second plea. (Record, p. 8.) Thus it will be seen that the only action of the courts below to be reviewed, is as to the second plea, and that what appears herein under Point I, on pages 4, 5 and 6, is superfluous. The opinion of the supreme court of New Mexico recognizes this to be the fact. (Record, p. 12.) This was discovered too late to have the brief reprinted.

was rendered in favor of a co-partnership, and the plea alleging that one of the partners was dead simply amounted to the suggestion of the death of that partner, the proceedings would go one in the name of the survivor. There would be no necessity for a revivor, or the substitution of the personal representa tive of the deceased partner. The suit did not abate by the death and the personal representative of the deceased partner is not a proper party.

The first plea, as a plea in abatement, alleges no reason why the writ should not issue. It is not good as a plea in abatement. Upon the death of a party being suggested, if the right of action survives to the remaining parners, the action may proceed. The writ at the time the demurrer was overruled, was so proceeding.

"Where there are several plaintiffs or defendants to an action, and one of them dies, or his powers as a personal representative cease, if the right of action survives to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record."

Compiled Laws of N. M. (1897) Sec. 3089.
5 Ency of Pleading & Practice, 814.

The matter alleged in the first plea, even if a good defense to the writ, was not under oath, as required by the statute.

"All pleas in abatement, except pleas to the jurisdiction as to the subject, shall be under oath." Sec. 2973 of the Compiled Laws of N. M., (1897.)

The sections of the Compiled Laws above quoted, as to the survival of actions, where one of two or more plaintiffs die, and pleas in abatement,

were in force when this cause was heard in the Court below. They are merely declaratory statements of the common law. This proceeding would have survived under common law principles. The common law was adopted in New Mexico as the rule of practice and decision in 1876.

Walker vs. New Mexico & Southern Pac. Rd. Co., 165 U. S., 604-5.

In Tidd's Practice, it is stated: "When there were two or more plaintiffs in a personal action, the death of one or more of them, pending the suit, would formerly in some cases have abated it. But now, by the statute 8 & 9 W. III, c. 11, Sec. 7, 'if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.'"

2 Tidd's Practice, p. 1119.

This statute became a part of the common law of New Mexico. This statute is recognized, and is the general practice in the United States.

5 Ency. of Pleading & Practice, 814.

II.

The vital question in this case, the one upon which both the District and Supreme Courts

of the Territory decided the case, is whether or not the Act of 1891, (Section 2914 of the Compiled Laws of 1897) is a bar to the revival of this judgment by scire facias.

This act was passed as a substitute for section 1861 of the Compiled Laws of New Mexico, 1884. The statute at the time of the passage of the substitute was as follows:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided.

"Sec. 1861. Actions upon any judgment of any Court of record of any state or territory of the United States, or the federal courts of the United States, within fifteen years."

Sections 1860 and 1861 of the Compiled Laws of 1884.

The act of 1891 was a substitute for the last section above quoted and must be read in connection with the preceeding section, and they were carried into the compilation of 1897, and are as follows:

"Sec. 2913. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue and not afterwards, except when otherwise specially provided.

"Sec. 2914. Actions founded upon any judgment of any Court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterward, and actions founded upon any judgment of any court of record of any other territory or state of the United States, or of the federal courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: Provided, That actions may be brought upon any existing judgment, which, but for this proviso, would be barred within

one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred."

Sections 2913 and 2914, Compiled Laws of 1897 Acts of 1891, page 114-15.

Stern v. Bates, 9 N. M. Rep., 286.

Appellant contends, that a judgment at Common Law was not barred, but remained in full force and effect for twenty years after rendition. Executions could be issued at any time, within that period, provided one execution had been previously issued within a year and a day, and in that case there was no presumption of satisfaction within a less period of time than twenty years. As Blackstone puts it: "But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the Court concludes prima facie that the judgment is satisfied and extinct; yet, however, it will grant a writ of ~~fieri~~ scire facias, in pursuance of the staute of Westminster 2, 13 Edw. 1 c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued; * * * * *" (3 Blackstone, 421.)

2 Freeman on Judgments, 4 Ed., Sec. 464.

2 Black on Judgments, Secs. 992-3-4.

The New Mexico Act of 1887, p. 213, extended the time within which execution might issue to keep a judgment alive without reviving the same, from a year and a day to five years. This act is as follows:

"Sec. 3085. That hereafter it shall not be necessary to bring proceedings in any Court to revive a judgment having been already obtained before a court of competent jurisdiction in this territory, except in cases where such judgment had been rendered for a period of five years or more next preceeding the issue of final process for the enforcement of the same.

"Sec. 3086. An execution may issue at any time, on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same."

Sections 3085 and 3086 of the Compiled Laws of 1897; Act of 1887.

Unless, then, the act of 1891, supra, quoted above, which provides that actions founded upon any judgment may be brought within seven years, and not afterwards, when read in connection with section 1860 of the Compiled Laws, prescribing the time within which suits and actions may be brought, includes a proceeding by scire facias to revive a judgment, the plea of the defendant, that judgment had been rendered nearly ten years before the suing out of the writ of scire facias, was not good and the demurrer should not have been overruled.

Is a proceeding by writ of scire facias an action or suit within the meaning of these statutes? Plaintiff in error contends it is but a continuation of the original action and is not the bringing of a new suit.

"A scire facias * * * is in general founded on a recognizance or judgment: Upon the former, it is

an original proceeding; but upon a judgment, it is only a continuation of the former suit: * * * this is not a new action, but a continuation of the old one; it is only a scire facias to revive the former judgment: * * *" 2 Tidd's Practice, side paging, 1136, and cases cited in note A.)

In speaking of a scire facias to revive a judgment, the same author, pages 1102-3, says:

"But if the plaintiff, after he had obtained judgment in a personal action, had lain by, and taken no process of execution within the year, he was put to a new original upon his judgment, and no scire facias was issuable; because there was not a judgment for any particuar thing in the personal action, with which the execution could be compared: Therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no scire facias, to show cause why there should not be execution; but if the party had exceeded his time, he was put to his action on the judgment, and the defendant was obliged to show how the debt, of which the judgment was evidence, was discharged. (e)

To remedy this and make the modes of proceeding more uniform in both actions, the statute of Westm. 2, (13 Edw. 1.) stat. 1, c. 45, gave a scire facias to the plaintiff in a personal action to revive the judgment, when he had omitted to sue execution within the year after judgment was obtained. (a) The words of the act are, "that those things which are found enrolled before them that have the record, or contained in fines, whether they be contracts, covenants, obligations, services or customs, recogniz-

ances, or other things whatsoever enrolled, to which the King's court may lawfully give effect, from henceforth shall have such force, that hereafter it shall not be necessary to implead upon them: But when the plaintiff comes to the King's court, if the recognizance of fine levied be recent, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognizance. And if perchance the recognizance were made, or fine levied of longer time past the sheriff shall be commanded, that he make known to the party of whom the complaint is made, that he be before the justices at a certain day, to show if he has anything to say, why such matters enrolled, or contained in the fine, ought not to be executed And if he do not come at the day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing enrolled, or contained in the fine to be executed." But notwithstanding this statute, the plaintiff may still proceed, if he think proper, by action of debt on the judgment.

The reason why plaintiff is put to his scire facias after the year is because when he lies by so long after judgment, it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed, without being called upon, and having an opportunity in court of pleading the release, or showing cause, if he can, why the execution should not go: (b) And it is said, that if the plaintiff delay executing a writ of inquiry till a year after interlocutory judgment, he cannot do it after,

without a scire facias. (c) The year must be computed from the day of signing judgment; (d) and the year depending upon the statute 13 Edw. 1, c. 45, the words of which are "infra annum," is to be reckoned by calendar months, and not by terms. (ee) And if the plaintiff sue a scire facias within a year after the judgment, he cannot afterwards have a capias ad satisfaciendum within the year, till he hath a new judgment in the scire facias. (f)

The general rule, however, that the plaintiff cannot take out execution after the year without a scire facias, must be understood with the following restrictions. When a fieri facias or capias ad satisfaciendum is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterwards, without a scire facias: * * *"

See also page 1105, et seq., same author, where the subject is fully treated; and to the same effect 3 Blackstone, p. 421.

After quoting at length from authorities, 2 Freeman on Judgments, section 442 and subsequent sections, says: "Scire facias is sometimes spoken of as a new action. But the object sought and the result accomplished by a scire facias to revive a judgment both show that it is not a new action, but merely a continuance of an old one; no cause of action beyond the old judgment can be asserted; no ground of defense anterior to the old judgment can be brought forward; no relief beyond that embraced in the old judgment can be obtained; and finally the judgment entered upon the scire facias is simply "that the plaintiff have execution for the judgment mentioned

in the said scire facias, and costs"; * *

21 Am. & Eng. Ency. of Law, First Ed.), 855-6-7.

18 Ency. of Pl. & Pr., 1059, 1060.

This Court has expressly held that under a statute similar to 8 and 9 William III, scire facias to revive such a judgment is not a new action but a continuance of the old.

McKnight v. Craig, 6 Cranch, 183.

Also in Davis v. Packard, 7 Peters, 286, it says: "A scire facias upon a judgment is for some purposes only a continuation of the former suit, but an action of debt on a judgment is an original suit."

Davis v. Packard, 7 Peters, 286.

See also:

Lee v. Giles, 1 Bailey Law, 449; 21 Am. Dec., 476, and note.

Coomb v. Jordan, 3 Blands Ch., 284; 22 Am. Dec., 271.

See especially note by Freeman to Frierson v. Harris' Heirs, 94 American Dec., 223, for a discussion of the nature of the writ when used to revive a judgment.

It was expressly held not to be a new suit in

Fitzhugh v. Blake, 2 Cranch C. C., 37; 9 Fed. Cases, No. 4840.

The Circuit Court of Appeals for the Eighth Circuit has expressly passed on this question since this case was decided in the Supreme Court of New Mex-

.co. Sanborn, judge, said:

"The proceeding by writ of scire facias to revive a personal judgment is statutory. It had its origin in the statute of Westminster II (13, Edw. 1, c. 45). It is not an original proceeding, but a mere continuance of the former suit,—a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment. Adams v. Savage, 3 Salk., 321, 2 Bac. Abr., 508; McGill v. Perrigo, 9 Johns., 259; Humphreys v. Lundy, 37 Mo., 320, 323. Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against the judgments and its lien, if it have one, and to give the creditor a new right of enforcement from the date of the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment, and any lien which it evidences, as of the date of the judgment of revival." Cooley, Bl. Comm. 3, 656; Walsh v. Bosse, 16 Mo. App., 231; Insurance Co. v. Hill, 17 Mo. App., 593; Fagan v. Bently, 32 Ga., 534; Farrell v. Gleason, 11 Clark & F., 702, 712. It is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, of which the creditor may avail himself, regardless of such an action. Until payment of the debt has been enforced, he may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of the one is no defense to the other. "Coke, Inst., 472; Carter v. Coleman, 34 N. C., 274; Lambson v. Moffett, 61 Md., 426, 431."

Lafayette County v. Wonderly, 34 C. C. App. Rep., 360; 92 Fed. Rep., 314.

The following addit.onal authorities ail hold that a scire facias is a continuance of the original action, some of them use the experession "proceeding in the or.ginal suit" in distinction to the briging of a new action of debt, based on the judgment already rendered.

Smith v. Stevens, 133 Ill., 183.
Bankers' Life Ins. Co. v. Robbins, 59 Neb., 170.
Comstock v. Holbrook, 16 Gray., 11.
Humphreys v. Lundy, 37 Mo., 320.
Dickey v. Craig, 5 Paige, 283.
McGill v. Perrigo, 9 Johns., 259.
Ingram v. Lelk, 2 Strobhart's Law, 207: 47 Am. Dec., 591.
Irvin v. Nixon's Heirs, 11 Pa. St., 419

III.

WHAT IS THE PROPER CONSTRUCTION OF THE STATUTE?

It clearly follows that if a scire facias is a proceeding in the original suit, and is not the commencement of a new suit, that it is not within the terms of the statute limiting "actions" on judgments to seven years.

The original action must be considered to have been pending ever since the judgment was rendered, unless the statute expressly barred it. Without such an express statute, it would remain in force for the pupose of issuance of scire facias for the full common law period of twenty years.

The act of 1891 is a substitute for section 1861 of the Compiled Laws of 1884, and is to be construed as a part of the chapter in which section 1861 occurs. It provides a statute of limitations for actions on judgments rendered in the Territory, and makes the period of limitation for actions on all judgments, Territorial or Extra-Territorial, seven years.

The filing in the proper clerk's office of the petition declaration, bill or affidavit, upon which process is authorized by law to be issued, shall be deemed the commencement of an action. The process, and all the process, sought by a scire facias proceeding to revive a judgment, is an execution of the original judgment. Under the authorities it is merely a continuation of the original suit, only a mere concluding part, having its foundation solely upon the judgment in the original action and in no sense an action in itself. It is a step in the original action, necessary, before an execution ~~can~~ *can* issue. The judgment rendered upon the scire facias is simply "that the plaintiff have execution for the judgment mentioned in the said scire facias and costs."

2 Freeman on Judg., Sec. 442, and cases cited in note 1, page 764.

In 2 Tidd, 1102, in stating the reason why the statute, Westm. 2, giving the remedy of scire facias, was passed, it is said, that before the enactment of that statute if a year and a day was allowed to pass the judgment was presumed to be executed "and the law allowed him no scire facias to show cause why there should be no execution; but if the party had ex-

ceeded his time he was put to his action on the judgment," thus drawing clearly the distinction between the scire facias and an action on the judgment. The very statute itself of Westm. 2, above quoted, referring to such records, says that they "from henceforth shall have such force that hereafter it shall not be necessary to implead upon them," showing that it was the purpose of the statute to provide a remedy by scire facias so that an action would not be necessary.

In addition to the above authorities, that a scire facias, quare executionem non, is not a new action, but merely a continuation of the old one, see Fitzhugh v. ~~Hoke~~ Blake, 2 Cranch, C. C., 37; 9 Fed. Cases, No. 4840 supra.

In Adams v. Rowe, 11 Maine, 89 (25 Am. Dec. 266), the distinction is clearly pointed out, as in the Common Law authorities above quoted, between scire facias whenever it is used to carry into effect a former judgment against a party to it, and scire facias against bail. The first "is not properly an action but a mere continuation of an action." The second scire facias, against bail, is a new action. See also Carter v. Carrigers Administrators, 24 Am. Dec., 585 (3 Yerger, 411).

In Irwin v. Nixon's Heirs, 51 Am. Dec., 562 (11 Pa. St., 419), speaking of the decision of the Court below, it is said: "So far from the Court being correct in this important particular, it unfortunately happens that it is a common, plain and familiar principle, that a scire facias, to revive a judgment post annum et diem, is but a continuation of the original

action, and the execution thereof is an execution on the former judgment."

See also note to Fetterman v. Murphy, 28 Am. Dec., 734; 4 Watts, 424.

It is easy to quote cases of scire facias against bail holding that it is a new action; but, as above pointed out in the quotations from Freeman, Sec. 442, and other authorities cited, to speak of it as a new action when used to revive a judgment is not correct. The Court below and counsel for defendant in quoting authorities seem to have fallen into error in confusing scire facias against bail with scire facias qua re executionem non. In the first, of scire facias against bail, the defendants were not former parties to the suit, but are made so by the scire facias, and the judgment is different.

From the authorities above cited it clearly appears that the revival of a dormant judgment by scire facias is not the bringing of a new action but merely the continuation of an old one in which a judgment was rendered. A party could, however, if he saw fit, bring a new action in debt, and the statute of Westminster 2, authorizing a scire facias, was to avoid the necessity of bringing such new action; and it follows that the legislature may have limited the time within which he could bring a new action without taking away the remedy by scire facias.

The statute does not expressly provide that no scire facias shall be had, or that no execution shall issue after seven years. The Territorial Supreme Court concludes that because the act of 1887, Com-

piled Laws of 1897, Sec. 3086, provided that an execution could issue at any time within five years, instead of a year and a day as at common law, and used the words "without the necessity of bringing any action to revive the same," that therefore the word "action" in the subsequent legislation of 1891 should be held to include a scire facias. This does not follow. This statute was meant to extend the time for the issuance of an execution. The Court then proceeds to argue that a scire facias is a separate action. It quotes some authorities so holding. But it is opposed to the decisions of this Court and the great weight of authority, and generally rests upon some peculiar statute.

See

Lafayette Co. v. Wonderly, 34 C. C. A., 360; 92 Fed. Rep., 314.

Davis v. Packard, 7 Peters, 286, supra.

The Court also fell into error in its construction of the decision of this Court in the case of Ross vs. Duval, 13 Peters, 45. It quotes the case as authority for the proposition that a scire facias is barred by a statute only barring actions on judgments. The Virginia statute being construed by the Court, expressly provided that "Judgments in any Court of record within the commonwealth, where execution hath not issue, may be revived by scire facias, or an action of debt brought thereon within ten years next after, and not after," &c. It expressly barred scire facias after ten years. The statute also allowed, at-

ter an execution had issued, or no return had been made, other executions at any time within ten years, and not after.

Ross v. Duval, 13 Peters, 59.

The Court held that neither execution nor scire facias could issue under this statute after the lapse of ten years. Both were expressly barred. There is nothing in the case that sustains the opinion of the Court below. It is an authority in favor of appellant. It showed the necessity for a provision barring scire facias, otherwise it could be sued out at any time within the common law period of twenty years.

IV.

General statutes of limitation do not bar the writ of scire facias, unless expressly mentioned therein.

This statute is a substitute for section 1861 of the Compiled Laws of 1884, quoted supra. It should be construed as a part of the Chapter in which the section for which it was substituted occurred, and especially in connection with the next preceeding section, quote supra. It provides a statute of limitations for actions on judgments rendered in the Territory, as well as for those rendered outside of the Territory. It bars actions on all judgments, wherever rendered, in seven years, under the New Mexico statute.

Section 2920 of the Compiled Laws of N. M., 1897, is as follows:

"The filing in the proper clerk's office of the petition, declaration, bill or affidavit, upon the filing of

which process is authorized by law to be issued, with intent that process shall issue immediately thereupon, which intent shall be presumed, unless the contrary appear, shall be deemed a commencement of the action."

Sec. 2920 Comp. Laws of N. M., (1897).

This was in force prior to the enactment of section 2914, supra, in 1861, and is a part of the same chapter, and the two are to be construed together. The writ of scire facias issues on a praecipe—an execution issues upon a mere request to the clerk. This statute very much more clearly shows what the legislature meant by "action" than the separate and distinct statute extending the time for issuance of execution from a year and a day to five years.

Section 3086, supra.

9 New Mexico, 323.

The process, and all the process, sought by a scire facias proceeding to revive a judgment, is an execution of the original judgment.

General statutes of limitations do not include scire facias by use of the term "action."

The Supreme Court of Washington said, in a case where the proceeding to revive a judgment was demurred to, on the ground that no judgment had been entered within six years prior to the filing of the motion to revive:

"We are of the opinion that the proceeding prescribed by statute to revive the lien of a judgment is not the commencement of an action, but only a mode by which to secure the fruits of an action already had and determined between the parties, and that section 27 of the Code is not applicable thereto. 5 Wait,

Act. & Def., 641-643; Murch v. Moore, 2 Or., 189; Tyler's Ex'rs. v. Winslow, 16 Ohio St., 364."

Burns v. Conners, 1 Wash, Stat., 6; 23 Pac. Rep., 837.

The Supreme Court of Alabama has decided that although the judgment may be revived, the right to bring an action on it, is not extended beyond the six years limitation from the date of entering the original judgment. It says:

"The order to revive does no more than reinvest the plaintiff with the right to have execution on his original judgment. His cause of action against the defendant is the original judgment, not the order to revive. * * * The common law right to sue on the judgment is not enlarged or made to accrue anew by force of the order. This Court has recently decided that the date of the accrual of the common law cause of action on the judgment is not postponed by the issue of executions under the statuate. Field v. Sims, 96 Ala., 500; 11 South. Rep., 763. It is plain that a new lease of life is not given to that cause of action by merely affording to the plaintiff the opportunity of resorting to the cumulative and independent remedy for the enforcement of judgment by means of executions upon it. As the plaintiff's right to maintain the suit must be rested upon the original judgment, and not upon the order to revive, and as nearly eight years had elapsed from the date of the entry of that judgment, the suit was barred by the statute of limitations of six years."

Marx v. Sanders, 98 Ala., 500; 11 South. Rep., 764.

The Supreme Court of New York, in a very similar proceeding, held that the ordinary statute of limitations did not apply.

Maples v. Mackey, 89 New York, 148.

The Supreme Court of Nebraska, in a well considered case, said:

"We will now inquire whether the Court was justified in making the order of revivor more than four years after Morrow died, and more than five years after the issuance of an execution on the judgment. The statutory proceeding to revive a dormant judgment is a substitute for the common law writ of scire facias. It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the Court to execute a judgment already in existence. Eaton v. Hasty, 6 Neb., 419; Irwin v. Nixon's Heirs, 11 Pa. St., 425; Rice v. Moore, 48 Kan., 590, 30 Pac., 10; Freem. Ex'ns (1st Ed.) Sec. 81. Clearly, then, the general limitation law which prescribes the time within which civil actions shall be commenced, has no application to the revivor of judgments."

Bankers' Life Ins. Co. v. Robbins, 59 Neb., 170; 80 N. W. Rep., 485.

See also:

Hunter v. Leahy, 18 Neb., 80.

The Supreme Court of Missouri has said of scire facias: "It is not the commencement of an action to which the statute of limitations can be pleaded."

Humphreys v. Lundy, 37 Mo., 323; citing,
Brown v. Byrd, 5 Eng., (Ark.) 533.
Evans v. White, 7 Eng. (Ark.) 33.

The Supreme Court of Ohio, in construing a statute of limitations with reference to domestic judgments, has said:

"It can hardly be supposed that, without any specific provision to that effect, it was understood that the merging of a cause or right of action, as ordinarily understood, in a judgment, was the accruing of a cause of action. Surely the object of adjudicating a claim or 'cause of action' and the rendition of judgment thereon is not to mature, or 'accrue' a right of action, but to terminate a cause of action in a judgment finally determining the rights of the parties, and to secure the remedies that follow a judgment. Undoubtedly a judgment is a cause or right of action of the highest nature, and that such action accrues when the judgment is rendered; but its objects and purposes are ordinarily so foreign to the mere maturity or accruing of a right of action, that it would be deemed singular to speak of the rendition of a judgment merging an adjudicated claim, as the accruing of a cause of action; and, especially would this be so, in relation to a domestic judgment, where the only purpose of obtaining it may be the remedies that follow.

"We think that the view we take of this statute, as applied to a domestic judgment, harmonizes with the general construction given to it by the bar of this state for more than thirty years and now to give it effect beyond the ordinary import of the language and terms employed in it, would make it a snare as well as a statute of repose."

Tyler's Ex'rs. v. Winslow, 15 Oh. St., 369.

This language is quite appropriate to the effort to construe this statute as barring by implication the very remedies, the rendition of the judgment gave the judgment plaintiff.

In Montgomery v. ~~Peay~~ Brittin, 23 Ark., 322, it was expressly held that the statute of limitations in regard to actions on judgments did not apply to scire facias to revive.

Montgomery v. Britt, 23 Ark., 322.
Brandy v. Peary 23 Pa. 172.

The Supreme Court of New Mexico was in error as to nearly every case cited in its opinion. Greenway v. Dare, 6 N. J. Law, 306, was not a scire facias to revive a judgment at all. It was a proceeding under a statute. An examination of the case will show that it was a proceeding to obtain a judgment on a verdict, rendered on a plea of set off in favor of the defendant. It was not based on a judgment at all. Murch v. Moore, 2 Ore., 189, also referred to, is an authority directly in point to the effect that a general statute of limitations is no bar to scire facias to revive a judgment. We submit that an examination of the authorities will show few cases holding that a statute of limitations barring actions on judgments, also bars scire facias to revive. We have already called attention to the Virginia statute and the Court's error as to the decision in

Ross v. Duval, 13 Peters, 45.

V.

Statutes of limitations barring remedies, or actions, are restricted to the cases falling expressly within their terms, and will not be extended by implication.

Sutherland on Stat. Cons., 368.

Endlich on Inter. of Stat., Sec. 343, where it is said:

"Statutes of limitations are to be strictly construed." There may not necessarily be any moral wrong in setting up the defense of lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment (and therefore not to be extended to cases not within their words, though possibly within their reason, nor to be construed most pre-judicially to the

right they limit;) while provisions which give exceptions to the operation of such enactments are to be construed liberally. (Although such statutes, being repose, are not tobe evaded by construction, and consequently, though in terms applicable only to actions, apply to all claims that may be the subject of actions, however, presented, falling within their intended operation, yet they cannot be made to apply to a cause of action not embraced within their intention by presenting it in a form of action to which, in terms it is made applicable, the nature of the cause of action, not the form, determining the applicability of the statutes."

Endlich on Inter. Stat., Sec. 343: citing

Elder v. Bradley, 2 Sneed, 247, where it is said:

"It is a hard and rigorous rule, which, from motives of policy, the legislature has thought proper to declare, and while it is of course the duty of the Courts to enforce it, it is not their duty to give it that construction which will be most to the prejudice of those whose remedies and rights are to be forfeited by it but in favor of the right, which in all such cases is in peril."

In 115 U. S., 626, the Court quotes from Townsend v. Jemison, 9 How., 407, with approval: "The rule in the United States Courts in respect to pleas of the statute of limitations has always been that they strictly effect the remedy and not the merits."

Campbell v. Holt, 115 U. S., 626.

Townsend v. Jemison, 9 How., 407.

13 Am. & Eng. Enc. of Law, 703.

See also:

Hauenstein v. Lynham, 100 U. S., 488.

"If a party has a right to several actions, one is not necessarily barred because the others are."

13 Am. & Eng. Enc. of Law, 691.

"If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been."

Lamb v. Clark, 23 Mass., 198.

See also:

McDonald v. McDonald, 8 Yerg., 145.

Wood on Limitations, 112.

Bedford v. Brady, 10 Yerg., 350.

The two remedies are distinct. In Carter v. Coleman, 12 ~~Freed.~~ Sneed., 174, it is held that an action of debt to recover the amount of a dormant judgment, or a scire facias to revive it, may both be pending at the same time, and a judgment on the scire facias cannot be pleaded in bar of the action of debt.

It follows therefore, that although the statute may have barred plaintiff's right to bring a creditors' bill on this judgment, or sue upon it in any independent action, nevertheless, his right to revive the judgment by scire facias would not be taken away unless the statute expressly so provided.

The Court was in error in the construction given to this statute, and the case should be reversed.

WILLIAM B. CHILDERS,

Attorney for Plaintiff in Error, and Appellant.

Nos. 165 and 247.
Brf. of Rodey for D.

Office Supreme Court, U.S.
FILED
FEB 20 1901
JAMES H. MCKENNEY,
Clerk.

(17,[illegible] and 17,711.)

Filed Feb. 20, 1901.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 165.

Browne, Manzanares & Company, Plaintiffs in error.
vs.
Francisco Chaves, Second, Defendant in error.

Filed December 11, 1899, Error to the Supreme Court of New Mexico.

No. 247

Browne, Manzanares & Company, Appellants.
vs.
Francisco Chaves, Second, Appellee.

Filed April 15, 1900, Appeal from the Supreme Court of New Mexico.

Brief on Behalf of Defendant in Error and Appellee.

BERNARD S. RODEY,
Attorney for Defendant in Error and Appellee.

ALBUQUERQUE JOURNAL-DEMOCRAT.

(17,583 and 17,711.)

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 165

Browne, Manzanares & Company,
Plaintiffs in error.
vs
Francisco Chaves, Second,
Defendant in error.

Filed December 11, 1899, Error to the Supreme Court of New Mexico.

No. 247

Browne, Manzanares & Company,
Appellants.
vs.
Francisco Chaves, Second,
Appellee.

Filed April 10, 1900, Appeal from the Supreme Court of New Mexico.

Brief on Behalf of Defendant in Error and Appellee.

BERNARD S. RODEY,
Attorney for Defendant in Error and Appellee.

STATEMENT OF THE CASE.

The two cases being one and the same, it is assumed that the first, which was taken up on writ of error, will be dismissed, and the second, which was taken up on appeal, retained.

But two questions were raised in the Court where the cause originated, one on defendant's plea suggesting the death of one of the plaintiffs, which was abandoned after a demurrer to it was sustained; and the other on plaintiffs' demurrer to defendant's plea of the statute of limitations to the writ of *scire facias* The Court overruled this demurrer, thus ending plaintiffs' cause of action. This is the only error assigned. It is a simple question of law, as to what is the proper construction to be placed upon a statute of New Mexico relating to the life of a judgment.

The facts of the case are, that on October 7, 1885, appellants recovered judgment in the District Court for Bernalillo County, New Mexico, against appellee for $4,170 damages and costs. Nothing was done with this judgment, not even to the extent of issuing an execution upon it for almost ten years thereafter, or until September 30, 1895, when a *praecipe* for *scire facias* was filed, a writ issued and service had. The defendant at once came in, and under the statute pleaded the age of the judgment in abatement, to which plaintiffs promptly demurrer. The Court overruled the demurrer.

The statutes referred to are as follows:

First: The act of January 23, 1880, compiled in 1884 as Sections 1860 and 1861, as follows:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue and not afterwards, except when otherwise specially provided.

"Sec. 1861. Actions upon any judgment of any court of record of any state or territory of the United States or the federal courts of the United States, within fifteen years."

Second: The act of February 10, 1887, compiled in 1897 as sections 3085-6, as follows:

"Sec.3085. That hereafter it shall not be necessary to bring proceedings in any Court to revive a judgment having been already obtained before a court of competent jurisdiction in this Territory, except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.

"Sec. 3086. An execution may issue at any time, on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same;" and

Third. The act of February 24, 1891, which is a revision of, and substitute for the act of 1880 first aforesaid, and is as follows:

"Sec. 1. That so much of the laws of the Territory of New Mexico as is compiled as section 1861 of the Compiled Laws of the Territory of New Mexico of 1884, be and the same is hereby repealed, and the following be and the same is hereby substituted therefor:

"Sec. 2 (1861.) Actions founded upon any judgment of any Court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterwards,

and actions founded upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal Courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: Provided, That actions may be brought upon any existing judgment which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." This latter Section 2, of the act of 1891, is compiled in 1897 as Section 2914.

As stated, no execution was issued upon the judgment after it was obtained, either within a year and a day thereafter under the common law rule, which was then in force in New Mexico, or under the five year statutory rule of the act of 1887 above quoted, or at all, even up to the time the attempt to revive it was made in 1895, when it was as stated, almost ten years old.

Appellee contends that under the act of 1891 aforesaid, the judgment was dead, and not simply dormant at the time it was attempted to revive it, and both of the New Mexico Courts agree with him.

The act of 1891 is a statute of limitation, and restricts the life of a New Mexico judgment to seven years from the date it became final; if it can be made to live for any greater length of time under the statute aforesaid, and this is doubtful, it must be through reviving it by scire facias or by a direct action of debt upon it, previous to the lapsing of the seven years, because if permitted to die a death of limitation, the

Court would have no power by any sort of proceeding over it.

Under the common law rule, for failure to have an execution issued upon it, within a year and a day, this judgment became dormant on October 8, 1886, and if it can be said that the act of 1887 was retroactive as to it, and revived it from its then dormant condition under the year and a day rule, then for lack of having had an execution issued upon it within five years from the date of its rendition, it again became dormant on October 7, 1890, and so remained until it died a death of limitation on October 7, 1892, or at least on February 24, 1893, under the one year proviso of the act of February 24, 1891, aforesaid. in 1895 when it was attempted to revive it by *scire facias* it had been dead under the seven year limitation for two and perhaps three years. But appellants contend that the judgment was simply dormant. after it became a year and a day old on October 8, 1896, and that under the common law rule, which gave all judgments life for twenty years, it could be revived at any time thereafter by *scire facias* or by direct action of debt upon it, within ninteen years (less a day); and that the only effect of the act of 1891 was to destroy the reviving remedy by action of debt, after the lapse of seven years, and leave the remedy by *scire facias* for the remainder of the time.

Appellants further contend that the word "actions" in the act of 1891, is not broad enough to include *scire facias*, which it is contended is not an ac-

tion at all, but a supplemental proceeding in the original suit.

However this may be in theory, the District Court below, on two hearings, as shown by the record, held the contrary and the Supreme Court of New Mexico also refused to take such a view of the statute, setting out its reasons fully sustained by authorities for so doing, in the following opinion:

OPINION OF THE COURT.

McFie, J.:

From the above statement of facts, it is apparent that the sole question for this Court to determine is whether or not the Court below erred in overruling the demurrer to the defendant's plea of the statute of limitations.

If the statute of limitations of the Territory runs against a proceeding by *scire facias* to revive a judgment, the demurrer to such plea was properly overruled and there was no error.

If the statute does not run against such action, the plea, of course, was an improper one, and it was error to overrule the demurrer thereto.

In determining this matter it is important to observe the difference between a dormant and a barred judgment.

A dormant judgment is one that has become inoperative as to its execution, but a barred judgment is one that is dead and cannot be enforced or revived over the objection of the judgment debtor.

At common law the life of a judgment was twenty years, but if an execution was not issued thereon

within a year and a day, the judgment became dormant and an alias execution could not issue thereon unless revived by *scire facias*.

The judgment, therefore, although it had become dormant, was not dead, as its life was twenty years. If the first execution was issued within a year and a day, it did not then become dormant; on the contrary executions might issue for its enforcement during its life of twenty years, unless it became dormant for some other reason—such, for instance, as death of the parties to it, or assignment, &c., when it might issue for its enforcement, notwithstanding its changed condition.

Freeman on Executions, sec. 81, says:

"Before any judgment is either satisfied or barred by lapse of time it may become temporarily inoperative, so far as the right to issue execution is concerned, and so continue until something is done by which it is revived. In this condition it is usually called a dormant judgment."

The writ of *scire facias* was adopted at common law as the proper means of restoring vitality to a dormant judgment before it was satisfied or barred by limitation.

Bingham on Judgments and Executions, 123 and 124, thus defines the writ of *scire facias:* "It is a writ issued out of a court wherein judgment has been entered or to which a record has been removed, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue."

It is clear that at common law the proceeding by *scire facias* was not a new or distinct action, but simply a writ or process in the original suit for the sole purpose of securing the right to issue execution upon a dormant judgment prior to the expiration of its legal life, and it was not intended nor used for the purpose of reviving a judgment whose life had expired and became barred by a statute of limitation.

In the early case of Ross vs. Duval, et al., 13th Peters, p. 44, the court was considering a case from Virginia. In that state the law provided that a judgment might be revived upon a motion in the nature of *scire facias*. The statute of limitation as to judgments was ten years. Duval, et al, had recovered a judgment against Ross, and when the judgment was about fifteen years old a motion was made for an execution to issue, and the motion being sustained, on appeal it was urged that the execution was illegally issued, because the statute of limitation of ten years had barred the judgment and all process upon it.

In construing that statute and its effect in that case the court said: "It is enough to know that the act of 1792 (((Virginia) imposes a limitation to actions and executions on judgments by which, like all other limitation laws of the state, a judgment becomes inoperative. An action of debt will not lie upon it, nor can it be revived by *scire facias*, much less can an execution be issued upon it. Its vitality is gone beyond the reach of legal renovation."

This case did not arise under the common law, it is true, but under a statute. We refer to it, however,

as showing the construction of a statute of limitation and that its effect is to destroy the vitality of such judgments beyond the power of revival by *scire facias* or any other process.

Many other cases might be cited to the same effect but it is unnecessary.

The distinction between a dormant and a barred judgment is very clear, and with this in mind it is not difficult to understand the apparent conflict of authority found in the briefs of the respective counsel in this case.

The case of Smith vs. Stevens, 133 Ill., 183; 24 N. E. Rep., 511, is cited by plaintiffs in error to sustain their contention, wherein the court held that "although the statute of Illinois provided that the lien of a judgment should continue for only seven years, and that the judgment at that time should become *functus officio* as affecting the lands therein described, that nevertheless it might be revived by *scire facias*," &c.

In that case the Illinois statute provided that the life of a judgment should be twenty years, but that it ceased to be a lien on real estate in seven years. In other words, it became dormant as to the lien on real state in seven years, but could be revived by scire facias as to the lien during the remaining thirteen years of its life. It was a dormant, not a barred judgment.

The case of Murch vs. Moore, 2nd Oregon, 189, is not in point, because the court holds in that case

that a judgment is never barred under the laws of Oregon and may be executed until payment.

The common law, however, has been modified or set aside by statutory enactment in almost all the states and territories in regard to judgments and the limitation of action thereon.

While the right of action in debt and *scire facias* on judgments remain, other provisions are changed, and the authorities cited are not necessarily in conflict when the statutes upon which the decisions were rendered and the circumstances of each case are examined.

The proceeding to revive a dormant judgment in many of the states is by simple motion in the original cause, and execution is awarded by an order in the original case.

In such cases it is usually held that the order to revive does no more than reinvest the plaintiff with the right to have execution on his original judgment.

Marx vs. Sanders, 11 So. Rep., 764; 98 Ala., 500.

In that case the action of debt was held barred by the six years' statute of limitation, although the judgment had been once revived within its life.

In other states statutes provide, or are construed to mean that ***scire facias*** is an "action" within the meaning of the statute.

In Greenway vs. Dare, 6 N. J. Law, 306:

It was contended by counsel that the proceeding by ***scire facias*** was not an action or new proceeding, but a continuance of the original suit; but the court

held that "every scire facias is a new and independent action, referring to the former proceedings, but wholly distinct from them."

In Howard vs. Randall, 5th Atlantic Rep., 403.

The court says: "Whatever, strictly speaking, may be the nature of *scire facias* on a judgment at common law, under our statute it is an action or suit within section 2130, R. L."

The plaintiffs in error contend that a *scire facias* proceeding is not an action within the meaning of the laws of New Mexico, sec. 1861, Comp. Laws 1884, sec. 2, chap. 53, Laws of 1891, and therefore is not barred by that section, while defendant in error insists that it is *an action* within the meaning of that section.

Section 1860, C. L. 1884, is as folllows: "The following suits or actions, may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

Sec. 1861 prior to amendment by laws of 1891 was as follows: "Actions upon a judgment of any court or record of any state or territory of the United States, or federal courts of the United States, within fifteen years."

By these sections a limitation of fifteen years attached to foreign judgments and, if that section did not also include local judgments, the common law limitation of twenty years, applied to them until section 1861 was amended by sec. 2, chap. 53, Laws of

1891, (compiled in 1897 as sec. 2914), to read as follows:

"Sec. 2 (1891). "Actions founded upon a judgment of any court of the Territory of New Mexico, may be brought within seven years from and after the rendition of such judgment, and not afterwards; and actions founded upon any judgment of any court of record of any other territory or state of the United States, or of the federal courts may be brought within seven years from and after the rendition of such judgment, and not afterward; provided, that actions may be brought upon any existing judgments which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterwards; and all actions upon such judgments not commenced within the time limited by this act, shall be forever barred."

This section, as amended, applies to local judgments as well as foreign and federal, and fixes a positive limitation of right of action thereon at seven years, and specifically says, "and not afterwards." It is not denied that this limitation would bar an action of debt on a judgment, but it is insisted that the words "actions founded on any judgment," are used in a limited sense, and do not include proceedings by *scire facias* to revive a judgment.

We cannot so construe this language, as it was evidently used in its comprehensive sense and was intended to apply to all suits or actions which could properly be brought on a judgment. "Actions founded upon any judgment" are very comprehensive words, the word actions being in the plural, the language is equivalent to saying all actions the basis of which is a judgment!

To construe this language as plaintiffs in error contend for, would be to hold that an action of debt on a judgment could not be brought because it was barred by the statute in seven years, nor could any other suit be brought, but by *scire facias* the barred judgment may be revived and an execution issued upon it.

Such a construction is absurd and could not have been the intention of the legislature enacting the amendment.

The words "shall be forever barred," in the last line of the section, referring to stale judgments, emphasize the view that this section was intended to bar forever and render invalid all judgments more than seven years old, unless the proper steps had been taken to revive them.

This section was carefully drawn, as is shown by the proviso giving one year's time in which to revive stale judgments, referred to in the proviso.

In 1887 the legislature enlarged the time for issuing execution on judgments to five years. Sec. 2, chap. 61, Laws of 1887, reads as follows:

"Sec. 2. An action may issue at any time on behalf of any one interested in such judgment, referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing any action to revive the same."

It will be observed that the word "action" in that section is used in a liberal sense and refers directly to the proceedings to revive judgments.

The proceedings in this case showw all the characteristics of an action at law. The record shows that

a praecipe was issued for the writ, and the writ of *scire facias* was issued, which is declared to be the equivalent of a declaration. The writ was returnable, as other writs are; the defendant was ordered to show cause; pleas and demurrer were filed as in other cases; a judgment overruling the demurrer and dismissing the cause was entered, and plaintiffs in error have the *scire facias* proceedings not the original action, in this court seeking a review and reversal, and we see no reason why such proceedings should not be considered *an action* within the meaning of our statute.

The legislatures of many of our states have set aside the common law rule and made *scire facias* a new and independent action, and we are of opinion that the legislature of this territory accomplished the same purpose when the law of 1891 was enacted.

When the legislature declared that "Actions founded upon any judgment, unless brought within seven years, would be forever barred," it evidently intended that seven years was a reasonable time in which to revive them, and that after such time they should be beyond the power of legal renovation by any proceeding whatever, and this we hold to be the meaning and intent of section 1861 of the Com. Laws of 1884 as amended in 1891, and compiled in 1897 as sec. 2914.

"Statutes of limitation are now almost universally regarded favorably as statutes of repose, and liberally construed, and the older decisions to the contrary are disapproved."

Am. and Eng. Ency. Law, vol. 13, p. 692.

"Where the law furnishes to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, we think such debtor can appeal to the statute of limitation as a protection."

Glenn vs. Dorsheimer, 23 Fed. Rep., 095.

"And he cannot prevent the statute of limitations from running against him by a circuitous legal proceeding.

Glenn vs. Priest, ex'r, 28 Fed. Rep., 907.

Neither plaintiff nor defendant will be allowed to thwart the beneficial and healtful effect of the statute of repose by any mere strategy of legal proceeding.

Am. and Eng. Ency. Law, Vol. 13, (1st Ed.), p. 691.

"It would be a mere strategy of legal proceeding to hold that a judgment could be revived by a scire facias, although other actions thereon were barred, and we therefore hold that section 2914, Comp. Laws 1897, applies to proceedings by *scire facias* to revive judgments in this territory.

The judgment in this case was nearly ten years old at the time this action was brought, and no execution had ever issued upon it, so far as the record shows.

The bar of the statute was properly pleaded against it, and the demurrer was properly overruled.

The overruling of the demurrer to the plea of the statute of limitation and the dismissal of the cause being the only errors assigned, the judgment of the lower court is affirmed with costs.

JOHN R. McFIE,
Associate Justice.

We concur.

WILLIAM J. MILLS, C. J.
J. W. CRUMPACKER, A. J.
FRANK W. PARKER, A. J.
CHARLES A. LELAND, A. J.

Aug. 16th, 1898.

It will thus be seen that the supreme court of New Mexico unanimously held against appellants' contention, and it has since passed directly on this very act of 1891 as to foreign judgments and held not only that a seven year old foreign judgment was barred absolutely, but that any foreign judgment existing at the date of the passage of the act of 1891, however young, was, under the proviso, also barred in one year thereafter.

Stern & Krauss v. Bates, 9 N. M., (Gil.) 286.

A judgment that has died a death of limitation cannot be revived by scire facias, even though execution had been issued upon it during its life. This holding was made under statutes like ours.

Vick v. Chewning, 31 Miss., 201.

Stewart v. Justices (Mo.) 47 Fed. Rep., 482.

Siebels v. Hodges, 65 Ga., 245.

Mullikin v. Dewall, 7 Gil & J., (Md.) 355.

In examining the legislation of New Mexico, supra, and on seeing that the act of 1891 put local judgments (an honest and righteous act) upon the same footing as the judgments of sister jurisdictions,

one cannot get away from the conclusion that the language used means just what it says, "* * * actions founded upon any judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment and not afterwards. * * *"

The evident object of the legislation was to supply the omission as to local judgments in Section 1861 as it previously stood, and one cannot get away from the conclusion that the life of every judgment rendered in every court of this Territory is but seven years.

It is quite easy to understand the act of 1891, because there were many judgments then existing which were at the date of the passage of that act more than seven years old, and would therefore be barred save for th proviso giving them one additional year of life, within which they might be revived, and when the legislature said in the proviso "* * * and all actions upon such judgments not commenced within the time limited by this act, shall be forever barred," it meant, of course, just what it said. It is utterly impossible to give the act in question any other construction.

It was contended below that to give the statute the construction here contended for would give our domestic judgments effect for no longer time than foreign judgments, but it appears to counsel for appellee that such would be an upright and honest act on the part of legislature to do so.

The proposition of law that statutes of limitation

affect the remedy and not the merits, is not denied here, but that question is not involved. Statutes of limitation are now regarded as statutes of repose, and "highly beneficiary to the community," and the day has passed when courts sought to suppress by all their ingenuity such a defense. See the comprehensive note on this subject in 13 Am. & Eng. Ency. of Law, pp. 692-3.

The citation by appellant of Section 444 of Freeman on Judgments, is against it wherein it says "it is form but not in fact a separate action," because it characterizes it as *an action*, and thereby shows the meaning of the word action in our statute. A reading of the chapter on *scire facias* in Freeman on Judgments beginning at Section 442, will easily convince this court that the rule in Pennsylvania and other states, in fact all of the states, is such that although *scire facias* may be said technically speaking, not to be a new suit, still such a proceeding is an action within the meaning of such an act as ours. The court can well see that if the demurrer in this case had been sustained and appellant had gone to trial it would get a new judgment with costs added, which would merge and bar the old judgment, and if it took execution or *scire facias* upon this new judgment, it would be for a greater amount than the old judgment, showing that in spite of all subtleties this proceeding is *an action* under our statute. It is numbered with a new number on the docket, and will proceed to judgment as an action.

It is wholly immaterial that there is in law

a difference between "an action" and *scire facias*, because if our legislature intended by the use of the word action to include scire facias, this court is bound to give that intention effect.

But scire facias is an action and has been held to be such in numerous cases.

Bryant v. Smith, 7 Coldw. (Tenn.), 113.

Kirkland v. Kreibs, 34 Md., 93.

Bilbo v. Allen, 4 Heisk. (Tenn.), 31.

Howard v. Randall, 58 Vt., 564.

Am. & Eng. Ency. of Law, Vol. 21, p. 856, notes and cases cited.

In the case of Potter vs. Tittcomb, 13 Me., p. 40, it is squarely held that *scire facias* is an action, and the court in that case stating the opposite view arguendo, says, "Dane holds *scire acias* on a judgment to be a mere continuance of the former action. In Underhill vs. Devereux, 2 Saund., 71, note 4, Sergent Williams states, that *scire facias* upon a judgment, is to some purposes, only a continuance of the former suit, and he cites Wright vs. Nutt, 1 T. R. 38, which was *scire facias*, brought merely to revive a judgment against executors." * * * Then the court says, after citing various authorities on that proposition, and distinguishing them, "in Atwood vs. Burr, 2 Saik., 603, *scire facias* against bail was declared a new distinct suit, and so it is regarded in 6 Dane, 463. In Clark vs. Paine, 11 Pick., 66, the court cites Dearborn vs. Dearborn, but says that there is

some force in the argument that a scire facias is an original writ, when a new party is brought into court. In Gonigal vs. Smith, 6 Johns, R. 106, which was *scire facias* to review a judgment, it was held to be a new action.

In Vol. 2, Sec. 505 of Coke upon Littleton, in commenting upon scire facias to revive a judgment after a year and a day, the author says that it is "[illegible] accounted in law to be in nature of an action," because the defendant might plead new matter to it, arising since the original judgment, and that therefore a release of "all actions would be a good bar to it," that was the language of Littleton, and Coke proceeds to add himself, that, "every writ whereunto the defendant may plead, be it original or judicial, is in law an action."

In Poulteney vs. Townson, 2 W. Black, 1277, the court held that a *scire facias* was upon principle a personal action; and this upon the authority of Littleton, Coke and Holt, who had given therefor an unanswerable reason, that the defendant may plead to it.

The same doctrine was recognized in Gray vs. Jones, 2 Wills., 251, and in Fenno vs. Evans, 1 T. R., 267. "And Sergeant Williams, in the note before cited says that as the defendant may plead to *scire facias* it is considered in law as an action, and in the nature of a new original. We are bound then upon authority to hold that the process before us (scire facias) is itself an action."

In the case of Howard vs. Randall, et al., from the Supreme Court of Vermont, reported in 5 Atl., 403

(supra,) it is held: "Scire facias under the provisions of the statutes of this state is an action within the provisions of R. L., Sections 2130-2141, and when one defendant dies with such an action pending against him and others, the action can proceed against the surviving defendants only."

The contention in that suit was as it is here, that *scire facias* was not an action within the meaning of their statute.

In the case of Greenway vs. Dare, 6 N. J. Law, p. 306, the court says: "Every scire facias is a new and independent action, referring to the former proceedings, but wholly distinct fom them."

In the case of Gonigal vs. Smith above referred to (6 Johns N. Y., 106), it was held that "* * * *scire facias* is a new action and requires a new warrant of attorney."

Appellant in its brief, page 18, says: "The statute (of 1891) does not expressly provide that no *scire facias* shall be had, or that no execution shall issue after seven years." Then what is the statute intended to accomplish? The answer is obvious, and the supreme court of New Mexico gave it in its opinion, supra.

It is respectfully submitted that no error was committed below and the decision of the supreme court of New Mexico should be affirmed.

B. S. RODEY,

Albuquerque, N. M., Att'y for Appellee.

Supreme Court of the United States.

Nos. 165 and 247.—October Term, 1900.

Browne, Manzanares & Company, Plaintiffs in Error, vs. Francisco Chavez, Second.	In error to and appeal from the Supreme Court of the Territory of New Mexico.
Browne & Manzanares Company, Appellants, vs. Francisco Chavez, Second.	

[April 8, 1901.]

This case was brought here both by writ of error and appeal. As there was no trial by jury and the issues were only questions of law determined by the trial court on demurrer, the writ of error is dismissed, and the cause considered on the appeal.

On the 7th of October, 1885, the firm of Browne, Manzanares & Company, composed of L. P. Browne, since deceased, and F. A. Manzanares, recovered judgment against Francisco Chavez, 2d, in the District Court of Bernalillo County, for the sum of $4,170, damages and costs. No action was taken in respect of this judgment, and no execution was issued upon it, so far as this record discloses. September 30, 1895, a writ of *scire facias* was sued out and service had. The defendant filed two pleas: the first suggesting the death of one of the plaintiffs since the rendition of the judgment, which plea was abandoned; the second, the plea of the statute of limitations, to which a demurrer was interposed by plaintiffs, which was overruled by the court. Plaintiffs thereupon refused to plead further and stood by their demurrer, whereupon the court rendered judgment dismissing the writ.

The statutes referred to are as follows:

An act of January 23, 1880, compiled in 1884 as sections 1860 and 1861, as follows:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided.

"Sec. 1861. Actions upon any judgment of any court of record of any State or Territory of the United States, or the Federal courts of the United States, within fifteen years."

An act of February 10, 1887, compiled in 1897 as sections 3085–6, as follows:

"SEC. 3085. That hereafter it shall not be necessary to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this Territory, except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.

"SEC. 3086. An execution may issue at any time, on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same."

An act of February 24, 1891, as follows:

"SECTION 1. That so much of the laws of the Territory of New Mexico as is compiled as section 1861 of the Compiled Laws of the Territory of New Mexico of 1884 be and the same is hereby repealed, and the following be and is hereby substituted therefor:

"SEC. 2 '(1861.) Actions founded upon any judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterward, and actions founded upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: *Provided*, That actions may be brought upon any existing judgment which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred.'"

This section was brought forward as section 2914 of the Compiled Laws of 1897.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The writ of *scire facias* has been, among other things, customarily used to obtain execution on a judgment which has become dormant. At common law it lay in real actions and on a writ of annuity, if the plaintiff did not take out execution within a year and a day, and it was given, under the same circumstances, in personal actions, by the statute of Second Westminster, 13 Edw. I, St. 1, c. 45, before which act, the plaintiff was put to a new action on his judgment. Foster on Scire Facias, 2, and cases cited.

The writ in this case was taken out to obtain execution of the judgment in question. That judgment was recovered October 7, 1885, and no execution had been issued thereon. The writ was dated September 30, 1895. The statute provided that "actions founded upon any judgment of any court of the Territory of New Mexico," and "upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal courts, may be brought within seven years from and after the

rendition of such judgment and not afterward: *Provided*, That actions may be brought upon any existing judgment, which, but for this proviso, would be barred within one year from and after the passage of this act and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." It thus appears that this judgment was barred according to the terms of the act some years before the writ was issued, but it is contended that although that was so, the bar did not apply to the writ of *scire facias*, by the use of which the judgment could be revived and an execution issued upon it notwithstanding the lapse of time.

It is argued that *scire facias* is not included in the words "all actions," barred by the statute, because a proceeding by *scire facias* is not an action, and because to hold it to be would be inconsistent with another statutory provision that actions should be commenced by "the filing in the proper clerk's office of the petition, declaration, bill or affidavit." (Compiled Laws, 1884, § 1867.) But we think that the averments in the writ are equivalent to a petition or declaration; and while it is true that a *scire facias* for the purpose of obtaining execution is ordinarily a judicial writ to continue the effect of the former judgment, yet it is in the nature of an action because the defendant may plead to it; and in many cases it has been classified as in substance a new action. Foster, 13; Coke Litt. 291*a*; *Fenner* v. *Evans*, 1 T. R. 267; *Winter* v. *Kretchman*, 2 T. R. 46; *Holmes* v. *Newlands*, 5 Q. B. 370; *Owens* v. *Henry*, 161 U. S. 645; *Kirkland* v. *Krebs*, 34 Md. 93; *Potter* v. *Titcomb*, 13 Maine, 36; *Gonnigal* v. *Smith*, 6 Johns. 106; *Cameron* v. *Young*, 6 How. Pr. 374; *Murphy* v. *Cochran*, 1 Hill, 339.

In *Fenner* v. *Evans* a *scire facias* had been issued to revive a judgment entered prior to the act of 17 Geo. III, c. 26, and execution had been taken out upon it. The *scire facias* and the execution were both set aside, the court holding that *scire facias* was an action within the second section of that act providing "that no action shall be brought on any such judgment already entered," &c.

By section forty of chapter twenty-seven, 3 and 4 Will. IV, it was provided that "no action, or suit, or other proceeding, shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. . . ." And it was held that no *scire facias* could be sued out to revive such a judgment after the lapse of twenty years. Foster, 14, 29; *Farren* v. *Beresford*, 10 Cl. & F. 319; *Farrell* v. *Gleeson*, 11 Cl. & F. 702. In these cases it was ruled that *scire facias* on a judgment was not a mere continuation of a former suit but created a new right.

In many jurisdictions provision is made for the revival of judgments by *scire facias* within a specified time, but our attention is called to no such provision in these statutes. The reference to revivor in such cases treats *scire facias*, if used, as an action. It was enacted by the act of 1887, now §§ 3085 and 3086 of the Compiled Laws of 1897, that it should not be necessary "to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this Territory, except in cases where such judgment had been rendered for a period of five years or more, . . ." and that an execution might issue at any time, "on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same." Assuming that *scire facias* lies under the code of New Mexico to revive a judgment it is included in the word "action" in this section, and we think it may properly be assumed to have been used in the same comprehensive sense in the act of 1891, prescribing the limitation on "all actions founded upon any judgment."

We agree with the Supreme Court of New Mexico that the construction contended for is unreasonable and would defeat the manifest object of the legislature, and that, after a judgment is barred under the statutes of New Mexico, a *scire facias* giving a new right and avoiding the statute cannot be maintained.

Writ of error in No. 165 *dismissed; judgment in No.* 247 *affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE